

Gauley Industries, Inc. and United Mine Workers of America. Cases 6-CA-13873 and 6-RC-8862

March 29, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS JENKINS AND HUNTER

On November 2, 1981, Administrative Law Judge Joel A. Harmatz issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Gauley Industries, Inc., Camden-on-Gauley, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enf'd, 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Neither the General Counsel nor the Charging Party filed exceptions to the Administrative Law Judge's findings in fn. 5 of his Decision that certain statements made by Coffindaffer did not violate Sec. 8(a)(1) of the Act.

In adopting the Administrative Law Judge's recommendation that the Employer's objection to the election be overruled, Chairman Van de Water and Member Hunter find that the alleged misrepresentation therein does not warrant the setting aside of the election under the majority or dissenting views expressed in *General Knit of California, Inc.*, 239 NLRB 619 (1978).

In the absence of exceptions thereto, we adopt, *pro forma*, the Administrative Law Judge's recommendation that the challenges to the ballots of Brentford Brown and George Brewster be overruled.

² Upon careful examination, we are of the opinion that the record is insufficient to permit a determination of the eligibility of W. E. Straley, and, accordingly, we decline to adopt the Administrative Law Judge's recommendation that the challenge to his ballot be sustained. Rather, we shall order that the Regional Director open and count the determinative challenged ballots of the other six employees whose eligibility was in dispute, and issue a revised tally of ballots. Only in the event that Straley's ballot remains determinative after the revised tally shall a further hearing on his eligibility be held.

In accordance with his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

IT IS FURTHER ORDERED that Case 6-RC-8862 be, and it hereby is, severed from Case 6-CA-13873, and that Case 6-RC-8862, be, and it hereby is, remanded to the Regional Director to open and count the ballots of Mary Christian, Kenneth Martin, Thomas Peyatt, Jeffrey Workman, Brentford Brown, and George Brewster, and thereafter prepare and cause to be served on the parties a revised tally of ballots including therein the count of said ballots. In the event the revised tally of ballots shows that Petitioner has received a majority of the valid ballots cast, without the ballot of W. E. Straley being determinative, the Regional Director shall issue a certification of representative. In the event that the ballot of W. E. Straley remains determinative after the issuance of a revised tally of ballots,

IT IS FURTHER ORDERED that a hearing be held before a duly designated hearing officer for the purpose of receiving evidence to resolve the issues raised by the challenge to the ballot of W. E. Straley, and that the Regional Director is hereby authorized to issue notice thereof.

IT IS FURTHER ORDERED that a hearing officer designated for the purpose of conducting such hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as to the disposition of said issues. Within 10 days from the date of issuance of such report, either party may file with the Board in Washington, D.C., eight copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the hearing officer.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge: Pursuant to an original unfair labor practice charge filed on September 19, 1980,¹ a complaint issued on October 21, alleging that Respondent independently violated Section 8(a)(1) by coercively interrogating employees, by threatening employees with plant closure and other unspecified reprisals, by stating that designation of the Union would be futile, by conditioning the continued employment of employees upon their rejection of the Union, by soliciting grievances while implying their correction if employees rejected the Union, by creating the impression that union activity was subject to surveillance, by informing employees that raises were to be withheld because of union activity, by promising employees wage increases if

¹ All dates refer to 1980, unless otherwise indicated.

the Union were rejected, by informing terminated employees that they would not be rehired because of their union activity, by creating the impression that a union official was subject to bribery, and by informing employees that a layoff had been accelerated because of their union activity. The complaint further alleges that Respondent violated Section 8(a)(3) and (1) of the Act by, on September 15, discharging employees Mary E. Christian, David Fletcher, Roger L. Lloyd, K. Wayne Martin, Dewey J. Meadows, Thomas Peyatt, and Jeffrey M. Workman. In its duly filed answer, Respondent denied that any unfair labor practices were committed.

Following issuance of said complaint, an election was conducted in Case 6-RC-8862 on December 5, with the tally of ballots showing that of 19 eligible voters 9 cast votes for, and 6 against, representation by the Petitioner. Seven cast challenged ballots which are determinative.² Thereafter the Employer filed a timely objection founded upon the Petitioner's alleged misconduct interfering with the validity of the election.

On December 11, the Regional Director for Region 6 issued his "Order Directing Hearing on Challenged Ballots and Notice of Hearing," and on March 26, 1981, said Regional Director issued his "Order Directing Hearing on Objection and Notice of Hearing." By virtue thereof, a hearing was directed upon the challenges and the Employer's objection as raising substantial and material issues best resolved on record testimony. Also on March 26, 1981, said Regional Director issued an "Amended Order Consolidating Cases," in which Cases 6-CA-13873 and 6-RC-8862 were consolidated for purposes of hearing, ruling, and decision by an administrative law judge.

Pursuant thereto, said proceeding was heard by me on June 4, 1981, in Webster Springs, West Virginia. After close of the hearing, briefs were filed on behalf of the General Counsel, Respondent Employer, and the Charging Party Petitioner.

Upon the entire record herein, including my personal observation of the witnesses while testifying and their demeanor, and upon consideration of the post-hearing briefs, I hereby find as follows:

FINDINGS OF FACT

I. JURISDICTION

Respondent Employer is a West Virginia corporation, with a place of business in Camden-on-Gauley, West Virginia, from which it is engaged in the business of milling magnetite. In the course and conduct of said operation, Respondent, during the 12-month period preceding September 30, purchased and received at said facility products, goods, and materials exceeding \$50,000 in value directly from points outside the State of West Virginia.

The complaint alleges, the answers admits, and I find that Respondent Employer is now, and has been at all

times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that United Mine Workers of America, herein called the Union, is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. CONCLUDING FINDINGS

A. The Issues

This proceeding relates to an organization campaign waged among Respondent's previously unrepresented employees, which opened on September 2, 1980. On that date, Larry O'Dell, an International organizer for the UMW, began contacting Respondent's employees. Subsequently, an initial union meeting was held on September 14 at the home of employee Mary Christian. There were 11 employees in attendance and all signed authorization cards. Later, the Union filed its election petition in Case 6-RC-8862 on October 10. The election was conducted on December 5.

The complaint in Case 6-CA-13873 charges Respondent with various acts of interference, restraint, and coercion between September 14 and September 29. With a single exception, these allegations are founded upon statements imputed to Bernard Coffindaffer, Respondent's president. Beyond Coffindaffer's alleged misconduct, the complaint includes a single 8(a)(1) allegation to the effect that Kenneth Ward, Respondent's plant manager, informed employees that a layoff had been accelerated by union activity. The layoff in question is the subject of further allegations to the effect that Respondent violated Section 8(a)(3) by discharging seven employees on September 15, the day after the initial union meeting.

Respondent asserts that all 8(a)(1) allegations are lacking in credible substantiation and are nonmeritorious, and, with respect to the terminations, it is further asserted that they were prompted solely by economic considerations.

In Case 6-RC-8862, it will be recalled that the Union achieved a 9-to-6 numerical majority at the December 5 election. However, the results were inconclusive in light of seven determinative challenged ballots and the Employer's timely filed objection. The issues derived from the challenges have in general terms been set forth previously.³ The objection derives from alleged statements on the part of union officials whereby eligible employees were informed that the Employer made over \$1 million in the prior year and in 1980 was making money "hand-over-fist." On behalf of the Employer it is argued that this was a deliberate lie and a misstatement of material fact made at a time allowing no opportunity for response.

² Those cast by Mary Christian, Kenneth Martin, Thomas Peyatt, and Jeffrey Workman were challenged by the Board agent because their employment status was governed by the unfair labor practice charges pending in Case 6-CA-13873. The ballots of George Brewster, Brentford Brown, and W. E. Straley were challenged by the Petitioner on supervisory grounds.

³ See fn. 2, *supra*.

B. Case 6-CA-13873

1. Interference, restraint, and coercion

a. The events of September 14

As will be recalled, the first union meeting was held at the home of Mary Christian on September 14. It was attended by 11 employees, including the 7 alleged discriminatees. Witnesses for the General Counsel describe Coffindaffer as having reacted immediately after conclusion thereof by embarking upon a pattern of intimidation. Thus, employees Donald Phillips and Rick Cobb, after attending the meeting, left in a single vehicle with Ken Martin and Workman. Cobb was dropped off, whereupon the others drove to a garage in Camden where Workman's vehicle had been parked. Shortly after their arrival, Coffindaffer, together with his wife, pulled into the garage area. Coffindaffer got out of his vehicle and approached Workman asking if Workman had keys to the plant. When Workman responded in the negative, Coffindaffer told him "there is no work tomorrow." At this point, the conversation grew heated and spread to all three employees. According to a composite of the testimony of Workman, Phillips, and Martin, all three were informed by Coffindaffer that he knew what they were up to, that he was closing the plant down, that it was up for sale, and that they no longer had a place of employment. Coffindaffer went on to indicate that if the men wanted a raise they could turn in their uniforms and insurance cards and he could afford to give them a raise. Coffindaffer stated further that he did not want the UMW or Teamsters on his property, asked the men what they wanted, and then took off his shirt throwing it in the direction of Martin, stating, "you want the shirt off my back, there it is . . . you couldn't get blood out of a turnip." Coffindaffer stated that the men would not succeed and that his family would fight them to the end.

According to Coffindaffer, that evening, he and his wife, while returning from a picnic, passed the garage in Camden-on-Gauley and observed Workman, Phillips, and Martin. He admits that he initiated the confrontation, explaining that he did so because he no longer wanted Workman in the plant.⁴

⁴ Coffindaffer, together with his wife, asserted that, during prior weeks, production time had been lost at the plant due to equipment damage caused by what they viewed to be industrial sabotage. As I understand Coffindaffer's testimony, he viewed Workman as responsible for such acts. Mrs. Coffindaffer testified that her husband approached the men that evening because they were in the vicinity of the plant, and due to the industrial sabotage that had taken place in the past, they suspected that perhaps the men were up to no good that evening. Her explanation is not entirely consistent with that of her husband. And, indeed, Coffindaffer's explanation for his taking this opportunity to confront Workman seemed implausible. For he related that his disenchantment with Workman was based on two specific incidents, one of which had occurred some 8 days, and the second, some 2 to 6 weeks, earlier. No reference is made by Coffindaffer as to anything occurring in the supervening period which would explain his belated, but sudden, need to confront Workman as to such matters on September 14. Coffindaffer's account as to the ensuing conversation included a denial of knowledge that the three men had just attended a union meeting or any mention of "union" in the course thereof. He also denied stating that the plant would be closed the next day, or instructing the men to pick up their checks. He did, however, acknowledge that wages and fringe benefits were discussed. Contrary to the Coffindaffers, the contention by the proponents of the complaint that

Based upon the credited testimony of Martin, Workman, and Phillips, I find that Coffindaffer approached the men after having gained knowledge of their union activity and conveyed that knowledge by implication in the course of the ensuing conversation, when he threatened to close the plant in reprisal for what he knew they were "up to." Respondent thereby violated Section 8(a)(1) of the Act.⁵

That Coffindaffer was aware of union activity on September 14 receives further confirmation from an incident which occurred later that same evening. At the time, Donald Phillips was visiting Rick Cobb, another employee who at the time of the hearing was actively employed by Respondent. At or about 8:30 p.m., Coffindaffer approached Phillips and Cobb, stating "if we wanted to forget our plans, that the gate would be open for us to come to work Monday morning."⁶ Coffindaffer acknowledged the encounter. His testimony, however, throws little light on the specifics, centering as it did upon the following colloquy with Respondent's counsel:

Mr. Holroyd: Did you say anything to them that if you want to forget your plans you can come to work in the morning?

Mr. Coffindaffer: I had lockout on my mind with one man, Jeff Workman. He was not coming near my mill, he didn't have no keys so I wasn't going to let him in no more. The work lockout was never mentioned to anyone else and it was never insinuated, but Workman wasn't coming and I knew it.

Mr. Holroyd: Well, did you tell Phillips that he and Cobb could come the next morning if they'd forget their organizing plans?

Mr. Coffindaffer: I didn't use no such statement. I told everybody the gate was open, that's the only words I used, the gate was open.

I credit Phillips and Cobb. Here again, it is considered unlikely that they would have concocted a story so prejudicial to the interest of their employer in this proceeding. Furthermore, based on their versions of the conversation, I find that Coffindaffer's reference to the employees' "plans," in the context, was a veiled, though sufficiently clear, reference to union activity. It is concluded that Respondent violated Section 8(a)(1) by Coffindaffer's statement to the effect that continued employment of Cobb and Phillips was conditioned upon abandonment of their union activity.

this entire incident was provoked by Coffindaffer's knowledge of union activity and his reaction to it is corroborated convincingly by the testimony of Donald Phillips, an incumbent employee at the time of the hearing, who earned in excess of \$18,000 while employed by Respondent in 1980. I did not believe that Phillips' corroborative version of the incident was manufactured.

⁵ I do not find that Coffindaffer's references to the fact that his family would fight the employees to the end, and his opinion that their union activity would fail to succeed, when considered independent of his threat of plant closure, constituted violations of Sec. 8(a)(1).

⁶ Cobb, when asked to repeat what was stated by Coffindaffer, averred that Coffindaffer expressly referred to plans of employees concerning the Union. Although the difference is not viewed as material, the latter testimony has been taken by me as representing Cobb's interpretation of what was said, rather than the words actually used.

In another incident, employee Dewey Meadows who had attended the union meeting that afternoon testified that, on the evening of September 14, he received a telephone call from Coffindaffer. Coffindaffer questioned Meadows as to whether he was aware of "anything about picketing or striking or anything at his plant the next morning." Meadows indicated that he had no such knowledge. Coffindaffer denied the incident. I credit Meadows.⁷ Based on his testimony, I find that Respondent violated Section 8(a)(1), inasmuch as Coffindaffer's inquiry was lacking in legitimate purpose and was calculated to discern Meadows' knowledge of union activity and hence would tend to result in disclosure of his sentiment.⁸

b. The events of September 15

On the morning of September 15, Don Phillips reported for work, but informed Coffindaffer that, while he wanted to work, his support of the UMW would continue. Coffindaffer, according to Phillips, told him to get together with the other employees and assemble their grievances and demands and present them to his secretary, adding that his books were open for the employees to see. Coffindaffer's position with respect to Phillips' testimony was manifested in the following colloquy with Respondent's counsel:

Mr. Holroyd: Okay. Mr. Phillips also testified that you told him to get their grievances together with others and bring them in with others and take them to the secretary you would get that, them resolved. Did you have that conversation?

Mr. Coffindaffer: No. But if he had such a thing on his mind, why didn't he do it? I never saw a scrap of information from nobody, except rumor.

Here again, I regarded Phillips as the more reliable witness. Based on his account, I find that Respondent violated Section 8(a)(1) by soliciting grievances under conditions tending to impede employee exercise of rights guaranteed by Section 7 of the Act. Coffindaffer's suggestion as to the accumulation and submission of employee demands was expressed in response to Phillips' mani-

festation of his continuing support of the Union. In such a context, rather than an abstract expression of management's continuing interest in production and efficiency of operation,⁹ a management-endorsed alternative to union representation was proffered, which would be taken by Phillips as carrying "compelling inference" that the grievances reported would be acted upon favorably and possibly corrected.¹⁰

Randall Phillips testified that, on September 15, Coffindaffer told him that he knew all the employees had signed cards and that "he couldn't afford the union . . . He had a lot of bills." According to Phillips, Coffindaffer went on to state that, while he had intended to put Tommy Peyatt, one of the alleged discriminatees, through mechanic school, he would not do so because of what Tommy Peyatt had done to him. Coffindaffer also allegedly told Phillips that Workman and Martin had started the Union. Coffindaffer's denial was not believed, and the testimony of Randall Phillips, an incumbent employee at the time of the hearing, is preferred. Based thereon, I find that Respondent violated Section 8(a)(1) by coercive interrogation, by creating the impression of surveillance, and by implying that an employee would be subject to retaliation because of his union activity.

The most dramatic occurrence on September 15 was the layoff. It is noted that most of those included worked their shifts that day. However, in the course thereof, the following was posted in the plant:

Please Notice:

To the EMPLOYEES of this Company.

Due to extreme economic conditions, it is necessary to cut-back on supplies, Employee Labor, all manner of things.

We regret this action. We hope some day the high cost of things will lessen and the company will make a profit.

You are hereby notified the following persons will no longer be EMPLOYED here - after 4 p.m. this date:

Jeffery M.	
Workman	Roger L. Lloyd
K. Wayne Martin	Dewey J. Meadows
David A. Fletcher	Thomas A. Peyatt
Mary F. Christian	

Please turn in all keys you have in your possession; turn in all Uniforms due the National Linen Service and arrange with Mrs. Haddix to pick up your final pay check now being prepared.

/s/ Bernard L. Coffindaffer

In explaining the timing for his action in this regard, Coffindaffer testified that he called his attorney, Holroyd, earlier that same day, advised him of "the situation," and on the advice of Holroyd prepared and posted the notice. No explanation emerges from Respondent's

⁷ Meadows was terminated on September 15, and was named in the complaint as among the alleged discriminatees. However, it appears that special allowances were made in his case. Thus, Meadows, after the layoff, was told by Coffindaffer, on the evening of September 15, to report to Craigsville where he was to work under Charlie Blake. Meadows did so, and worked for about a month. He was paid by Chelyan Oil Co., a firm which Coffindaffer identified as among those in which Coffindaffer's family held an interest. Thereafter, in October, Coffindaffer recalled Meadows, and he has remained in the employ of Respondent continuously since that date. Meadows impressed me as a more believable witness than Coffindaffer.

⁸ Mary Christian testified that on September 14 she received a message from her sister to the effect that Coffindaffer had telephoned indicating that Christian had been dismissed. On September 15, Christian reported for work and inquired of Coffindaffer as to her job status. Coffindaffer advised that he needed her, and also exclaimed that he had broken up a union meeting the night before at "the gas station." This latter testimony of Christian is consistent with the mutually corroborative and credited testimony of Phillips, Cobb, Meadows, Workman, and Martin as to Coffindaffer's knowledge, as of September 14, that employees had engaged in union activity. Her testimony is credited in this respect over that of Coffindaffer.

⁹ Cf. *Centre Engineering, Inc.*, 253 NLRB 419 (1980).

¹⁰ See, e.g., *Raley's Inc.*, 236 NLRB 971 (1978).

evidence as to why Coffindaffer sought advice of counsel at that juncture.

Those named in the notice attended the union meeting at Christian's home on September 14, and signed union authorization cards on that occasion. All are alleged to have been discharged in violation of Section 8(a)(3) and the issues pertaining thereto will be discussed below.

2. Other miscellaneous 8(a)(1) allegations

Don Phillips and Rick Cobb testified that, a few days after the layoff, Coffindaffer approached them indicating that he had heard that everybody had signed cards and inquiring as to whether they had done so or knew anything about it. While the testimony of Phillips and Cobb is somewhat less than symmetrical, I do believe that they were questioned concerning union activity on that occasion by Coffindaffer. Based thereon I find that Respondent violated Section 8(a)(1).

Anna Mae Fletcher, an incumbent employee at the time of the hearing, testified that, several days after the September 14 meeting, she asked Coffindaffer for a raise. He agreed to give her a raise, while advising her that he knew that all the employees had signed cards. However, a few days later, according to Fletcher, Coffindaffer approached her advising that "he had got a letter from . . . the International or something like that . . . he just couldn't give me a raise right then but would double my salary after this thing blew over." Coffindaffer first indicated that he did not believe that he had made a statement to Fletcher concerning the withholding of a wage increase, but then went on to imply to the contrary by affording the following explanation:

I misunderstood the NLRB regulations on the poster they sent me, okay.

And it says, "promising or granting promotions or pay raises or other benefits, et cetera, to employees," you know, I was capable of carrying out the promise so I was afraid of this thing, I was afraid of this, I didn't really read it carefully.

To the extent of any conflict, I accept the testimony of Fletcher over that of Coffindaffer and find that Respondent violated Section 8(a)(1) by creating the impression of surveillance and by placing the onus for the withholding of a promised increase upon the Union, while at the same time renewing that promise, albeit conditionally, upon rejection of the Union.

Fletcher also testified to a further encounter with Coffindaffer while she, Mrs. Coffindaffer, and George Brewster were working. She relates that Coffindaffer approached them and removed two \$100 bills from his wallet. He handed the bills to Brewster, and told Brewster to give them to the union representative, stating further that Brewster should tell them "when this thing's over, there'll be \$300 more." Brewster declined. As a witness for Respondent, Brewster acknowledged that the incident occurred but, according to his version, someone made a comment about joining the Union, whereupon Coffindaffer took two \$100 bills and told Brewster "if you wanted to go down and join the union. . . I'll give you the money and take it out of your next paycheck."

In the total circumstances, the testimony of Fletcher seemed the more probable, and I find that, by manifesting a propensity to commit bribery as a means of compromising employee self-organizational rights, Respondent violated Section 8(a)(1) of the Act.

Fletcher testified to a further conversation with Coffindaffer concerning a union meeting held on September 25, in connection with the National Labor Relations Board investigation of the instant unfair labor practice charge. On that occasion, Coffindaffer assertedly told her that he knew that the employees met at the "grill," but that she was not among them, because she had worked all day. Here again I credit Fletcher over Coffindaffer and find that Respondent thereby violated Section 8(a)(1) by creating the impression that protected activity of employees was subject to surveillance.

The final independent 8(a)(1) allegation is highly significant to the issues of discrimination emerging from the terminations of September 15. Thus, according to the testimony of Donald Phillips, on September 24, while Plant Manager Ward, in reference to the layoffs, stated "that he knew they were coming, but the union had speeded them up." Ward denied having made any such statement. I regarded Phillips as the more trustworthy and credit his testimony. Based thereon Respondent violated Section 8(a)(1) of the Act.

C. The Layoffs of September 15

Respondent is engaged in the processing of ore into magnetite, a business described by Plant Manager Ward as nonseasonal, with the upswings and downswings non-predictable.

As indicated, on September 15, seven employees who attended the union meeting of the previous day were terminated. According to Respondent, these layoffs, though allegedly founded upon economic considerations, were considered permanent with those terminated lacking any expectancy of recall.

I have heretofore found that the layoffs were effected shortly after Coffindaffer acquired knowledge of union activity and on the day after employees attended the first union meeting. Said discharges were timed to correspond with a pattern of unlawful conduct through which Coffindaffer clearly manifested his hostility to union activity. Thus, the elements of knowledge, timing, and union animus join together to support a strong *prima facie* showing of union-related discrimination.

By way of defense, Respondent points to the fact that its operations had never been profitable, that its losses over the years had been considerable, that employees had previously been informed that layoffs were imminent, and that an earlier decision to effect the layoffs on September 1 had been deferred. Although the defense is *partially* confirmed through Respondent's financial papers, it also rests at critical points upon parole testimony of Coffindaffer and Ward, both of whom impressed me as thoroughly unreliable.

In any event, prior to the layoff, Respondent's fiscal history reflected continuing financial adversity. According to Coffindaffer, corporate losses for the preceding fiscal years ending March 31 were as follows:

1976-77	\$ 62,000
1977-78	\$114,000
1978-79	\$593,000
1979-80	\$174,410.08 ¹¹

As for the period following March 31, 1980, Coffindaffer testified that office personnel prepared monthly reports on the Company's financial status. The Company's earnings experience during the months of April, May, and June 1980 is not disclosed by the record. However, Respondent did elect to place in evidence a monthly report covering July 1980, which shows an operating loss of \$37,320.64 for that month. Coffindaffer testified that he received the July statement between August 15 and 20, whereupon he determined that he "couldn't bring in any more outside money" and "knew I had to make economy moves from within."

Analysis fails to suggest that the July losses would necessarily portend a continuing pattern. During the summer of 1980, the Company was engaged in construction and maintenance activities of a nonrecurrent nature. The labor costs associated therewith, at least in part, would have been chargeable against income in July. Furthermore, in July the Company lost 2 weeks of production in consequence of the strike in the coal mines and thus it is entirely possible that during that month fixed expenses would have mounted without offset normally derived from a regularity of production. Finally, although the monthly statement for August 1980 was not introduced into evidence, on cross-examination by the General Counsel, Coffindaffer admitted that in August 1980 the Company enjoyed a net operating profit of \$1,301.83. The selective utilization of financial data, whether or not innocent, fails to inspire confidence in the defense.

Furthermore, while Respondent is hardly portrayed as a financially healthy concern, the defense demonstrates that Respondent's adverse financial posture was historic. Yet, the September 15 terminations appear on the record to have been unprecedented. When examined as to whether he found it necessary to lay off employees in the past, Coffindaffer could only recall that employees had been discharged for thievery. Beyond testimony of witnesses for the General Counsel that a 2-week temporary layoff was experienced in the summer of 1979, there is no evidence that the Company had ever before *permanently* laid off employees for economic reasons.

Moreover, Coffindaffer's testimony that he regarded the alleged discriminatees as having been permanently discharged arouses suspicion on other grounds as well. Thus, he explains that finality was assigned to the terminations because he did not anticipate that these individuals would be needed in the future. In contrast, Plant Manager Ward had testified that Respondent's operations were nonseasonal, with ups and downs in demand unpredictable. Indeed, within a month of the discharges, three of the seven—Meadows, Lloyd, and Fletcher—were recalled.

¹¹ Coffindaffer's testimony is confirmed for this period by the corporate income tax return filed with the IRS covering the period ending March 31, 1980. See Resp. Exh. 7. However, Resp. Exh. 6 is an accountant's report covering the same period which reflects a net operating loss of \$182,746.55.

Doubt which arises from the above, together with other factors, impairs the weight accorded to the fact that Respondent manifested an intention to sell the plant prior to the advent of union activity, or at least prior to its acquisition of knowledge thereof.¹² A desire to sell is not necessarily inconsistent with the maintenance of business operations on an indefinite basis at least till a suitable purchase arrangement is consummated. Here, it is clear that Respondent not only maintained operations throughout, but also invested in substantial maintenance and construction, as well as the acquisition of new equipment during the period immediately preceding the September 15 terminations.

Perhaps the most critical flaw which emerges from the defense relates to the explanation as to why Coffindaffer, in what appears to have been an act of suddenness, selected September 15 as the date for the layoff. It is true that both Plant Manager Ward and Coffindaffer testified that the possibility of layoffs had previously been announced to employees and that initially it was decided to effect the layoff on September 1.¹³ However, neither Coffindaffer nor Ward testified that employees were apprised that a layoff would take place specifically on September 1, or on any future date. Further, their explanations as to why the layoff did not take place as allegedly planned was contradictory. Thus, Ward testified that the layoff was deferred by "a two-week period to get the building washed and to get the things done before the Winter set in. . . ." On the other hand, Coffindaffer's explanation makes no reference to business needs, but was expressed as follows:

I didn't have the heart to lay people off that had kids to get ready for school. . . . and I know they needed a fair and square pay day and I didn't make no September 1st cut.

As for selection of September 15, Coffindaffer's own testimony implies strongly that that determination was made sometime during that very day. Thus, in accounting for certain aspects of his conduct on September 14, Coffindaffer averred that he told no one that the plant would close the following day, going on to state, "I had lock out on my mind with one man, Jeff Workman. . . . The word lock out was never mentioned to anyone else and it was never insinuated. . . ." It thus appears on the face of Coffindaffer's own testimony that, as of September 14, no determination had been made to effect the layoffs. Consistent with findings heretofore made, that determination was made after Coffindaffer consulted with his attorney, Holroyd, the day following the September

¹² The Wall Street Journal on September 15 carried an advertisement to this effect.

¹³ Coffindaffer, with corroboration from Ward, testified that he prepared notes used as a guide in addressing employees at a meeting held on August 18. See Resp. Exh. 4. Included therein is a notation as follows: "Cut-back, 10 or 12 const. work." Although Coffindaffer and Ward insist that this was conveyed to employees at that meeting, witnesses for the General Counsel who were identified by Coffindaffer as present at that meeting denied that the possibility of a layoff was mentioned. I believed the latter. It is further noted that the authenticity of Respondent's Exhibit 4 is no greater than the credibility of the witnesses who attempted to confirm its truth.

14 union meeting, and on the heels of Coffindaffer's acquisition of knowledge of such union activity. The defense offers no other explanation as to why Coffindaffer acted at that time.

At a very minimum, the record in this case confirms the statement attributed to Plant Manager Ward by Phillips that the layoffs were accelerated because of the union activity. As the testimony of Coffindaffer and Ward concerning the circumstances prompting the layoff is rejected, the defense is deemed lacking in credible foundation. Accordingly, I find that the General Counsel has established by a preponderance of the evidence that Respondent violated Section 8(a)(3) and (1) of the Act by, on September 15, discharging David Fletcher, Dewey Meadows, Jeffrey Workman, Roger Lloyd, Tom Peyatt, Mary Christian, and K. Wayne Martin.

D. Case 6-RC-8862

1. The objections

The specific objection filed by the Employer relates to statements imputed to Union Representative O'Dell in the course of telephonic conversations with certain employees the evening before the election. Thus, Joseph Lester, a truckdriver, related that he received such a call from O'Dell who attempted to persuade him to change his vote to prounion. In doing so, O'Dell explained the benefits the Union could provide, going on to indicate that Coffindaffer was making enough profits to provide these benefits. James Heinz, also a truckdriver, testified to a similar conversation in which O'Dell allegedly stated that Coffindaffer had made a lot of money and could afford to go union. Dewey Meadows testified to a conversation which took place in the presence of five others a couple of weeks before the election in which O'Dell allegedly stated that the Company was making a lot of money. The statements attributed to O'Dell are not viewed as warranting a rerun election. General commentary as to the earnings of an employer subject to an organization drive, without more, by union officials is generally taken as campaign augmentation or "puffing" which is subject to evaluation by employees. It is true that in *General Knit of California, Inc.*, 239 NLRB 619 (1978), the Board overruled *Shopping Kart Food Market, Inc.*, 228 NLRB 1311 (1977), and returned to the standard of review for alleged misrepresentations set forth in *Hollywood Ceramics Company, Inc.*, 140 NLRB 221 (1962). Pursuant thereto, the Board will consider the impact of alleged misstatements upon an election by reference to the following:

In evaluating the probable impact of a party's statement on the election, one factor which the Board will consider is whether the party making the statement possesses intimate knowledge of the subject matter so that the employees sought to be persuaded may be expected to attach added significance to its assertion. [140 NLRB at 224, fn. 10.]

Consistent therewith, misrepresentations as to the profit position of an employer may well preclude the proper atmosphere for the conduct of an election. Nonetheless,

Board policy with respect to such campaign rhetoric has not reached the level of absolute censorship.¹⁴ In this instance, O'Dell's remarks appear to have been made in an argumentative vein, and without reference to confirmatory facts which would tend to lend credence to the claimed profitability of the Employer. The element of special knowledge of the subject matter was lacking and O'Dell's view would be subject to evaluation by the employees. Accordingly, the Employer's objection is overruled.

Beyond the objection specifically raised by the Employer, Anna Mae Fletcher testified that, the night before the election, O'Dell visited her at her home and told her that he had "heard" that Fletcher and Cobb would be fired the next day if they "didn't vote." This matter was developed at the hearing, which in turn constituted a segment of the investigation of the question concerning representation. Accordingly, it is considered relevant to assessment of the validity of the election. It is concluded, however, that Fletcher's testimony in this respect furnishes no substantial basis for setting aside the first election. O'Dell's statement on its face purported to convey a rumor, as to a matter not within the Union's control, and whose coercive reach related to participation in the election, rather than the manner in which the employee or employees voted. Accordingly, I find that this remark raised no substantial issue affecting the validity of the election.¹⁵

2. The challenges

It having been found that Respondent unlawfully discharged Mary Christian, Kenneth Martin, Thomas Peyatt, and Jeffery Workman in violation of Section 8(a)(3) of the Act, it shall be recommended that the challenges to their ballots be overruled.

Remaining for consideration are the challenges to the ballots of Brentford Brown, George Brewster, and W. E. Straley. All were challenged by the Petitioner as supervisors within the meaning of the Act. In this respect, it is noted that Respondent's operations appear to be conducted by an onsite blue collar work force of approximately 20 employees. Coffindaffer appears to have taken an active part in plant operations. Kenneth Ward at times material was the plant manager. As I understand the Employer's position, Coffindaffer and Ward were the sole supervisors of production and maintenance operations.

Brentford Brown was the plant manager until January 1980. At that time he was injured on the job and qualified for workmen's compensation. In consequence, his active employment ceased. Ward was then hired to replace Brown as plant manager. In May 1980, when Brown returned to work, Brown continued to be compensated on a salary basis, but Ward was retained as plant manager. However, upon Brown's return, Coffindaffer conducted a meeting with employees in which he indicated that the men would be divided into groups and

¹⁴ See, e.g., *Electronic Components Corporation of North Carolina*, 215 NLRB 829 (1974); *Cumberland Wood and Chair Corp.*, 211 NLRB 312 (1974).

¹⁵ See, e.g., *Janler Plastic Mold Corporation*, 186 NLRB 540 (1970).

Brentford Brown would be the overseer of "outside work." Thereafter, Brown worked manually with others while instructing them as to the performance of various tasks both inside and outside the mill.

There is no evidence that during the eligibility period Brown had authority to hire,¹⁶ fire, discipline, or effectively to recommend the same. Nor does it appear that Brown held authority to control the hours of work of employees, or that he directed employees in their work exercising independent judgment of a nonroutine nature. In this latter respect, it is concluded that, at best, Brown acted as a conduit relaying work assignments communicated by Coffindaffer or Ward and simply exercised lead authority, of a routine nature, drawing from his many years of experience. I find that he was not a supervisor within the meaning of the Act,¹⁷ and, accordingly, the challenge to his ballot is overruled.

George Brewster described himself as a "leader" who worked all shifts. He was hired in May 1980. Generally, he works with a crew which is designated by Coffindaffer or Ward and which implement orders originating with the latter. At a meeting in the summer of 1980, employees were told by Coffindaffer that Brewster would be in charge of cleanup operations. However, Brewster possessed no authority to hire, fire, or to suspend those who failed to perform their work. Where discipline was indicated, Brewster would simply report the indiscretions to his supervisor, but had never been authorized to take corrective action. Brewster works with the men performing manual labor, and his authority appears to have been confined to telling those assigned to his crew what to do, and to report those who failed to respond. Although Brewster could tell employees to move from job to job, and would receive information from employees who elected to take time off, there is no evidence that he acted independently in approving such requests. With respect to direction of work, it does not appear that Brewster utilized independent discretion of a nonroutine nature, or that he possessed any authority removing him from the category of a nonsupervisory leadman.¹⁸ Accordingly, I find that he was eligible to participate in the election and the challenge to his ballot shall be overruled.

W. E. Straley is a licensed electrician who retired on August 15, 1980. His duties were assumed by George Peyatt. When Peyatt resigned from the Company's employ, Straley returned in October 1980 to perform electrical work on an "on-call" basis. He is listed on the Employer's payroll records as "electrical chief."

Straley's most recent employment was as a social security annuitant, and his hours of work are regulated so as to preserve his eligibility for such benefits. During the

last quarter of 1980, his hours were limited to 169 or less than 5 weeks based upon a 40-hour workweek. During this period, Straley also appears to have furnished advice to the Employer in connection with electrical problems on a compensation-free basis.

At the time of the election, Straley occupied the position of vice president of the Company.¹⁹ In his capacity as a vice president, Straley was called upon to sign corporate resolutions, and hence to exercise corporate authority. In the total circumstances, it would appear that Straley holds a special status through which he possesses interests sufficiently distinct from those of rank-and-file employees in the appropriate unit to warrant a conclusion that he has "no substantial and continuing interest" in the wages and hours and working conditions of unit employees. The challenge to his ballot shall be sustained.²⁰

3. Summary

As the objections have been overruled in their entirety, and as the challenges to the ballots of Christian, Martin, Peyatt, Workman, Brewster, and Brown remained determinative, it shall be recommended that the Regional Director open and count said ballots and issue a revised tally and the appropriate certification based thereon.

CONCLUSIONS OF LAW

1. Gauley Industries, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Mine Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees concerning union activity; by threatening employees with plant closure because of their union activity; by conditioning continued employment of employees upon their rejection of the Union; by soliciting grievances while implying that steps would be taken to correct them if the Union were rejected; by creating the impression that union activity was subject to surveillance; by informing employees that wages were to be withheld because of union activity but that wage increases would be granted upon rejection of the Union; by informing terminated employees that they would not be rehired because of union activity; by manifesting an intention to bribe union officials; and by informing employees that a layoff was accelerated by virtue of their union activity.

4. Respondent violated Section 8(a)(3) and (1) of the Act by on September 15, 1980, discharging employees Mary E. Christian, David Fletcher, Roger L. Lloyd, K. Wayne Martin, Dewey J. Meadows, Thomas Peyatt, and Jeffrey N. Workman in reprisal for their union activities.

¹⁶ Randy Phillips testified that he was hired in January 1980 after being interviewed by Brown. However, this took place apparently when Brown was plant manager and prior to his injury in January 1980. Accordingly, it is not relevant to an assessment of his status during the election eligibility period.

¹⁷ The fact that Ward and Coffindaffer on one occasion drew on Brown's expertise in connection with a railroad car derailment has been considered but is not viewed as warranting a contrary result.

¹⁸ Although rank-and-file employees were paid on an hourly basis, Brewster in September was placed on a salary. While I have considered this factor, it is not viewed as sufficient to alter the result.

¹⁹ The Employer describes Straley's incumbency as a vice president as one served in an "acting" capacity. However, it appears that this qualification is based on nothing more than the fact that there had been no new election of corporate officers in 1980. It is fair to infer that his tenure as a corporate official was based upon prior designation.

²⁰ See, e.g., *Dennis G. Maietta and Frank M. Maietta, t/a Maietta Contracting*, 251 NLRB 177, 183 (1980). See also *N.L.R.B. v. J. C. Lewis Motor Company, Inc.*, 180 F.2d 254 (5th Cir. 1950).

5. The unfair labor practices found above have an effect upon commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, it shall be recommended that Respondent cease and desist therefrom and take certain affirmative action deemed necessary to effectuate the policies of the Act. As Respondent's retaliatory discharge of seven employees upon discovery of union activity was accompanied by a pattern of coercive conduct so egregious as to threaten the very existence of employee rights protected by Section 7 of the Act, a broad order, precluding Respondent from "in any other manner" interfering with, coercing, or restraining employees in the exercise of said rights, shall be recommended.

Having found that Respondent terminated, in violation of Section 8(a)(3) and (1) of the Act, employees Mary Christian, David Fletcher, Roger Lloyd, K. Wayne Martin, Dewey J. Meadows, Thomas Peyatt, and Jeffrey M. Workman, it shall be recommended that Respondent be ordered to offer each immediate reinstatement to his or her former position,²¹ or, if not available, to a substantially equivalent position, without loss of seniority or other benefits, and to make each whole for any loss of earnings he or she may have suffered by reason of the discrimination against them, by payment of a sum of money equal to the amount he or she normally would have earned from the date of his or her discharge to the date of a bona fide offer of reinstatement, less net interim earnings during that period. Backpay shall be computed on a quarterly basis in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and shall include interest as specified in *Florida Steel Corporation*, 231 NLRB 651 (1977).²²

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER²³

The Respondent, Gauley Industries, Inc., Camden-on-Gauley, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Coercively interrogating employees concerning union activity.

(b) Threatening employees with plant closure because of their union activity.

(c) Conditioning employment of employees upon their rejection of the Union.

(d) Soliciting employee grievances in a manner discouraging union activity.

(e) Creating the impression that union activity is subject to surveillance.

(f) Telling employees that their wage increase was to be withheld because of their union activity and promising employees wage increases if they rejected the Union.

(g) Telling terminated employees that they would not be rehired because of their union activity.

(h) Telling employees that a layoff was accelerated by virtue of the union activity.

(i) Creating the impression that a union official was subject to bribery.

(j) Discouraging membership in a labor organization by discharging or in any other manner discriminating against employees with respect to their wages, hours, or tenure of employment.

(k) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act:

(a) Offer Mary E. Christian, David Fletcher, Roger L. Lloyd, K. Wayne Martin, Dewey J. Meadows, Thomas Peyatt, and Jeffrey M. Workman immediate reinstatement to their former positions or, if not available, to substantially equivalent positions, without loss of seniority, discharging their replacements if necessary, and make them whole for any earnings lost by reason of the discrimination against them in the manner defined in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due under the terms of this Order.

(c) Post at its facility in Camden-on-Gauley, West Virginia, copies of the attached notice marked "Appendix."²⁴ Copies thereof, on forms provided by the Regional Director for Region 6, shall be signed by Respondent's authorized representative and posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 6, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

²¹ Although it might be possible that certain of these employees would have been laid off for legitimate economic reasons at some date after September 15, that is a matter which might be resolved on credible convincing proof in the compliance stages of this proceeding. Furthermore, although Roger Lloyd, Dewey Meadows, and David Fletcher have been reemployed, it is not entirely clear that their restoration meets statutory requirements, and, hence, they shall be covered by the traditional reinstatement order.

²² See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

²³ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

²⁴ In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that Case 6-RC-8862 be severed from this proceeding and remanded to the Regional Director for Region 6 for the opening of the determinative challenged ballots, issuance of a revised tally, and the appropriate certification based thereon.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

- To engage in self-organization
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
- To refrain from the exercise of any or all such activities.

Accordingly, we give you these assurances.

WE WILL NOT coercively interrogate our employees concerning their union activity.

WE WILL NOT threaten our employees with plant closure because of their union activity.

WE WILL NOT solicit grievances from our employees while implying to correct them if they reject the Union.

WE WILL NOT create the impression that the union activity of our employees is subject to surveillance.

WE WILL NOT inform employees that their wage increases were withheld because of their union activity or that they will receive wage increases if the Union is rejected.

WE WILL NOT inform employees that those terminated will not be rehired because of their union activity.

WE WILL NOT create the impression that union officials could be bribed.

WE WILL NOT tell our employees that a layoff was accelerated by virtue of their union activity.

WE WILL NOT in any other manner interfere with, coerce, or restrain employees in the exercise of the rights set forth at the top of this notice.

WE WILL NOT discourage our employees from engaging in union activity by discharging or in any other manner discriminating with respect to their conditions of work or job tenure.

WE WILL grant immediate reinstatement to Mary E. Christian, David Fletcher, Roger L. Lloyd, K. Wayne Martin, Dewey J. Meadows, Thomas Peyatt, and Jeffrey M. Workman to their former positions without loss of seniority and other benefits and we shall make them whole for their lost earnings by reasons of our discrimination against them, with interest.

GAULEY INDUSTRIES, INC.